UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LI LI,

Plaintiff,

vs.

MICHAEL J. ASTRUE, Commissioner of Social Security Administration,

Defendant.

Case No. 07cv2200 J (JMA)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR ALTERNATIVELY, TO REMAND TO THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES

Currently before the Court is Defendants Michael Chertoff, Emilio Gonzales, Robert Mueller and Christina Poulos's ("Defendants") Motion to Dismiss or Alternatively, to Remand to the United States Citizenship and Immigration Services. Plaintiff Li Li ("Plaintiff") has not filed a Reply to Defendants' Motion. The Court **FINDS** that the authority cited by Defendants' is clear and that this Court lacks jurisdiction to review this complaint. As such, the Court **GRANTS** Defendants' Motion to Dismiss.

Background

Plaintiff, a native and citizen of China, was granted Lawful Permanent Resident status on July 23, 2001. (*See* Decl. of Richard E. Nicholson, Ex. A. ¶ 16.). On April 28, 2006, Plaintiff filed an Application for Naturalization ("N-400") with USCIS' California Service Center. *Id.* On or about May 15, 2006, the FBI received a name check request from USCIS.

See Decl. of Michael Cannon, Ex. B ¶ 41. To date, Plaintiff's FBI name check is incomplete and ongoing and her N–400 remains pending. *Id.* at ¶ 16; Ex. B, ¶ 41.

On November 9, 2007, Plaintiff filed a Complaint in Mandamus asking this Court to require Defendants to properly adjudicate her pending application. [Doc. No. 1.] Defendants move to dismiss the complaint on the grounds that mandamus relief is unavailable because Plaintiff's naturalization application is in the process of adjudication and remains in the background investigation phase. [Doc. No. 3.]

Legal Standard

"Mandamus is an extraordinary remedy and is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003).

Discussion

Defendants challenge the subject matter jurisdiction of the Court to entertain this action and move to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6). Other courts in this district have found that there is no subject matter jurisdiction over complaints pending an application for naturalization where the FBI name check is pending and USCIS has not conducted an interview. *See Dairi v. Chertoff*, No. 07cv1014, 2007 WL 3232503, *1 (S.D. Cal. Nov. 1, 2007). ("[T]here appears to be no legal basis for the court to exercise subject matter jurisdiction over the action to compel Defendants to proceed with the naturalization interview."); *Song v. Chertoff*, No. 07cv0855, 2007 WL 3256201, *1 n.1 (S.D. Cal. Nov. 1, 2007) (holding that there was no jurisdiction under 8 U.S.C. §§ 1447(b), 1421(c) or "under the provisions cited in his responsive brief"). *See also Sehari v. Gonzales*, No. 07cv0295, 2007 WL 2221053, *1 (S.D. Cal. July 31, 2007) (granting the defendant's motion to dismiss, in part, as to the USCIS Defendants). For the reasons stated below, this Court agrees with the other courts in this district that have addressed this issue and **GRANTS**

Defendants' Motion to Dismiss.

I. Plaintiff's Request for Relief under the Mandamus Statute

The Court **FINDS** that Defendants have satisfied their evidentiary burden to show Plaintiff's application for naturalization is in the process of adjudication and therefore Plaintiff's claim is neither clear and certain nor one subject to nondiscretionary, ministerial duties. While Defendants have the nondiscretionary duty to adjudicate Plaintiff's application, the USCIS has a great deal of discretion in how they process the congressionally mandated background investigation. The procedure includes an examination that may only occur after the completion of extensive criminal background checks, and a "definitive response from the Federal Bureau of Investigation that a full criminal background check has been completed." 8 C.F.R. § 335.2(b); Ex. A ¶ 17. Plaintiff's FBI name check is still ongoing so no examination of Plaintiff has taken place. Since Plaintiff's application has not been denied and she has not been examined, this Court does not have jurisdiction to review her complaint. *See* 8 U.S.C. §§ 1147(a)-(b).

II. Plaintiff's Failure to Provide a Federal Question

A federal court has jurisdiction as to a federal question where (1) the claim turns on an interpretation of the laws or Constitution of the United States, and (2) the claim is not "patently without merit." *Saleh v. Ridge*, 367 F. Supp. 2d 508, 511 (S.D.N.Y. 2005). As discussed above, Plaintiff's application is patently without merit. Her application for naturalization has not been denied and she has not been examined which leaves her without a mechanism for judicial review. Thus, this Court **DISMISSES** her complaint for lack of subject matter jurisdiction as to the presence of a federal question.

III. Plaintiff's Request for Relief under the Administrative Procedures Act

Contrary to Plaintiff's assertion, the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 et seq., does not provide an independent basis for jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Staacke v. U.S. Secretary of Labor*, 841 F. 2d 278, 282 (9th Cir. 1988). Instead, it merely provides the standards for reviewing agency action once jurisdiction is established. *Staacke*, 841 F.2d at 282. Additionally, the APA is specifically precluded where "agency action is committed to agency discretion by law." *Yan v. Mueller*, No. H-07-0313, 2007 WL 1521732, at *8, 5 U.S.C. § 701(a)(2) (precluding APA review of agency actions that are "committed to agency discretion by law."). As discussed above, the procedure of the USCIS is purely discretionary and thus not subject to review by this Court. Accordingly, this Court **FINDS** that it does not have jurisdiction under the APA.

IV. Plaintiff's Request for Relief under the Declaratory Judgment Act

Additionally, the Declaratory Judgment Act (DJA), 28 U.S.C. § 2201, does not provide an independent basis for jurisdiction and only expands the range of remedies available in federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *Janakes v. U.S. Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985) (the use of this statute "does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201."). Since there is no jurisdiction, the DJA does not vest this court with subject matter jurisdiction.

Because the Court **FINDS** that it does not have subject matter jurisdiction, it is unnecessary to address Defendants' claim that Plaintiff has failed to state a claim for which relief can be granted or, in the alternative, the matter should be remanded to the USCIS.

Conclusion

For the reasons stated above, the Court **GRANTS** Defendants' Motion to Dismiss or Alternatively, to Remand to the United States Citizenship and Immigration Services.

IT IS SO ORDERED.

DATED: June 13, 2008

HON. NAPOLEON A. JONES, JR.
United States District Judge

cc: Magistrate Judge Adler
All Parties of Record